FH [redacted]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[redacted]

REHEARING DECISION

FTI/150832

PRELIMINARY RECITALS

Pursuant to a petition filed July 24, 2013, under Wis. Stat. §49.85(4), and Wis. Admin. Code §§HA 3.03(1), (3), to review a decision by the Milwaukee Enrollment Services in regard to FoodShare benefits (FS), a rehearing was held on October 17, 2013, at Milwaukee, Wisconsin.

The issues for determination are whether the petitioner's appeal concerning her liability for FS overpayment Claim No. [redacted] was timely as a matter of law and whether the agency has met its burden of proof to show that she is liable for that overpayment.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:
Petitioner:

[redacted]

Respondent:

Department of Health Services
1 West Wilson Street
Madison, Wisconsin 53703
By: Pang Thao Xiong
Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:
Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [redacted]) is a resident of Indiana.
2. Petitioner received FS in Wisconsin from July 1, 2001 through May 31, 2002.
3. On May 13, 2002 petitioner's then-husband reported to the FS agency that he had been living with petitioner all along and that he was employed.
4. On June 3, 2002 petitioner closed her FS case. She moved to Indiana thereafter to avoid the domestic abuse situation she was going through with her then-husband.
5. On June 4, 2002 the agency initiated a referral for an FS overpayment against petitioner.
6. On October 15, 2004 the FS agency issued a notice of FS overpayment to petitioner at the last-known address it had for petitioner in Wisconsin. The overpayment period was July 1, 2001 through May 31, 2002, and the amount of overpayment was $6266.
7. On November 9, 2004 the FS agency issued a notice to petitioner at the last-known address it had for petitioner in Wisconsin stating it had not received payment on the overpayment.
8. On December 3, 2004 the FS agency issued a Dunning notice to petitioner at the last-known address it had for petitioner in Wisconsin.
9. On January 5, 2005 the FS agency issued a Dunning notice to petitioner at the last-known address it had for petitioner in Wisconsin.
10. On February 2, 2005 the FS agency issued a Dunning notice to petitioner at the last-known address it had for petitioner in Wisconsin.
11. On March 11, 2005 the Department of Workforce Development Public Assistance Collection Unit issued a notice to petitioner at the last-known address it had for petitioner in Wisconsin stating that it may intercept any of her tax refunds for the unpaid overpayment debt of $6266.
12. Petitioner did not receive the notices issued to her in 2004 and 2005 because she was no longer living in Wisconsin.

DISCUSSION

This appeal was processed as a Food Stamp "tax intercept" appeal. The Division of Hearings and Appeals' (DHA) administrative law judges have jurisdiction to review the appropriateness of *state* income tax refund interceptions certified by the Wisconsin Department of Health Services, by its collections agent, the Department of Workforce Development (DWD), to collect public assistance debts via the office of the Wisconsin Department of Revenue and its control of state income tax refunds and credits. See, Wis. Stat. §49.85(3).

However, that is not what the petitioner appealed here. Rather, the petitioner sought review of the *similar* act of the DWD's referral of her public assistance debt to the U.S. Treasury. Such a referral seeks recovery from an individual's *federal* income tax refund. Federal law allows the recovery of public assistance debts directly from such benefits. See, 31 U.S.C. §3720A; and see, 20 C.F.R. §§ 404.520 - .526. The petitioner did not recall getting notification of such a referral; rather, she alleges only receiving a July 3, 2013 letter from the Department of the Treasury stating that it had applied her federal refund to a debt she owed to the Department of Children and Families, Public Assistance Collection Unit in Wisconsin in the amount of $4762. She then, with the assistance of her tax preparer, contacted the PACU, and the county agency, but got no satisfaction. So, she appealed to DHA.

It is well-established that the DHA has no jurisdiction to review any collections or offsets effectuated by the United States' Treasury Department and DHA administrative law judges do not possess equitable powers. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions. No such statutes exist conferring the authority for me to review these federal recovery actions.

That having been said, the action that is the DWD referral of a FS overpayment is, ultimately, reviewable *if* the petitioner contested the FS overpayment determination; that appeal is timely filed, and that determination is found to be defective for some reason. That is, if the FS overpayment amount is found to be wrong in a hearing, then DHA would direct the PACU to correct, or rescind, the overpayment amount of record, and as referred to other agencies.

Turning to the instant appeal, the petitioner seeks a hearing on the issue of whether she is liable for the FS overpayment. Wis. Stat. §49.85, provides that the Department shall, at least annually, certify to the Department of Revenue amounts that it has determined that it may recover resulting from overissuance of FS. The Department of Health Services, by its collections agent, the DWD must notify the person that it intends to certify the overpayment to the Department of Revenue for setoff from his/her state income tax refund and must inform the person that he/she may appeal the decision by requesting a hearing within 30 days after the date of the letter. This is done by mailing the notice to the last-known address of record for the recipient. Wis. Stat. §49.85(3).

The hearing right is described in Wis. Stat. §49.85(4)(a), as follows:

> If a person has requested a hearing under this subsection, the department of health services shall hold a contested case hearing under s. 227.44, except that the department of health services may limit the scope of the hearing to exclude issues that were presented at a prior hearing or that could have been presented at a prior opportunity for hearing.

Regarding the prior opportunity for hearing, hearings concerning an overissuance of FS must be filed within 90 days of the date of the negative action to be timely as a matter of law. 7 C.F.R., §273.15(g); Wis. Admin. Code §HA 3.05(3)(a). The notice of the underlying FS overpayment stated the 90-day time limit. However, the petitioner testified that she did not actually receive any notice regarding an FS overpayment or a tax intercept.

The Department's representative at hearing established that the FS overpayment notice and the income tax refund intercept notice were issued to her last-known address. See, Exhibits #1 and #7. No more is required of the Department to effectuate the tax intercept than to mail the requisite notice with the requisite information to the last-known address. She is allowed only 30 days to appeal the tax intercept notice. DHA has a long-standing policy with regard to the filing of an appeal that the pertinent time limit for filing the appeal is tolled where the county agency or the Department cannot demonstrate that a notice of the negative action taken was mailed to the correct address, and the petitioner has not received it.

Where, however, it is demonstrated by the evidence that the notice was correctly mailed, this fact creates a rebuttable presumption of delivery that a petitioner must overcome with evidence demonstrating that the notice was not actually received. This interpretation is confirmed by caselaw.

> It is well established that the mailing of a letter creates a presumption that the letter was delivered and received. *See, Nack v. State, 189 Wis. 633, 636, 208 N.W. 487(1926), (citing* Wigmore, *Evidence*)2d. ed.) § 2153; 1 Wigmore, *Evidence* (2nd ed.) § 95) Mullen v. Braatz, 179 Wis. 2d 749, 753, 508 N.W.2d 446(Ct.App.1993); Solberg v. Sec. Of Dept

> of Health & Human Services, 583 F.Supp. 1095, 1097 (E.D.Wis.1984); Hagner v. United States, 285 U.S. 427, 430, 52. S.Ct. 417, 418(1932).
>
> ***(Portions of discussion not relevant here omitted).
>
> This evidence raises a rebuttable presumption which merely shifts to the challenging party the burden of presenting credible evidence of non-receipt. United States v. Freeman, 402 F.Supp. 1080, 1082(E.D.Wis.1975). Such a presumption may not, however, be given conclusive effect without violating the due process clause. United States v. Bowen, 414 F.2nd 1268, 1273(3d.Cir.1969); Mullen v. Braatz, 179 Wis. 2d at 453. If the defendant denies receipt of the mailing, the presumption is spent and a question of fact is raised. (Examiner note: Citations omitted here.) The issue is then one of credibility for the factfinder. The factfinder may believe the denial of receipt, or the factfinder may disbelieve the denial of receipt.

State ex. rel. Flores v. State, 183 Wis.2d 587, at 612-3 (1994).

The mere assertion of non-receipt or a lack of recollection of receiving the intercept certification notice and/or the original overissuance notice, is not sufficient to establish that the Department has failed to provide the petitioner with an opportunity to be heard in the statutorily mandated fashion. The petitioner needed to provide credible testimony or evidence to rebut the county's case; she did so. She and her tax preparer testified convincingly that she never received any notice of a FS overpayment prior to this appeal. That testimony is credible and is corroborated from the following facts and history of this case.

The initial notice of the underlying FS overpayment was sent to petitioner at the address the agency had for her when she was receiving FS. That notice was sent on October 15, *2004*. The agency's Case Comments showed that on May 13, *2002* petitioner's then-husband had called the agency to report that he had been living with petitioner all along and that he was employed. See Exhibit #8 and #10. This initiated a referral for the overpayment itself on June 4, *2002*. *Id.* However, I repeat that the overpayment notice was sent over 2 years later, after the referral. Further, on June 3, *2002* petitioner called to close her FS case. The agency agreed that petitioner had no ongoing duty at that point to continue updating her address changes. She had closed her case at that time and moved to Indiana to live with family there because of the domestic abuse situation she and her then-husband were going through. This is corroborated by the Cudahy Police Department reports showing police contacts on May 29, 2001, June 11, 2001 and June 21, 2001. See Exhibit #9. Those reports show a 911 call showing petitioner had called to report that her husband had taken their child, that the husband had filed for a temporary restraining order against her, and that there was a physical altercation between the two regarding the placement of their child. The police report also states that the husband was staying at his parents' house at an address other than what the agency had for petitioner's last known address. *Id.* The agency did not explain why the notice was sent two years after the referral. Even if petitioner had set up a forwarding address, by that late date, forwarding would not have occurred after 12 months. See http://faq.usps.com/adaptivedesktop/faq.jsp?ef=USPSFAQ&search=change%20of%20address&searchProperties=type%3anatural&naturalAdvance=false&varset%28source%29=sourceType%3asearch#timelimits.

Accordingly, I find jurisdiction present to reach the merits of the underlying FS overissuance determination as I believe the petitioner did not receive the underlying FS overpayment notice. The overpayment period runs from July 2001 through May 2002. The evidence provided by the petitioner showed the circumstances of her life at that time. The agency's only evidence was a report by the husband as evidenced in the Case Comments, who clearly from the police reports, had motivation to harass the petitioner. Petitioner testified that she and her husband were not living together during the overpayment period. This is corroborated by the police reports.

In a Fair Hearing concerning the propriety of an overpayment determination, the agency has the burden of proof to establish that the action taken by the county was proper given the facts of the case. I do not find that the agency has met its burden of proof to show by a preponderance of the credible evidence and direct testimony that petitioner is liable for the FS overpayment.

CONCLUSIONS OF LAW

1. Petitioner's appeal concerning her liability for FS overpayment Claim No. [redacted] was timely as a matter of law.

2. The agency has not met its burden of proof in establishing a FS overpayment (Claim No. [redacted]) against petitioner.

THEREFORE, it is **ORDERED**

That this matter be remanded to the county agency and the Public Assistance Collections Unit with instructions that within 10 days of the date of this decision it rescind FoodShare overpayment Claim No. [redacted] against petitioner. Furthermore, the agencies shall not attempt to intercept the petitioner's future tax refunds to recover this claim because this decision has determined on the merits that she is not responsible for the overpayment. Finally, the Public Assistance Collections Unit is ordered to take all steps necessary to ensure that any tax refund already intercepted from the petitioner to pay for this claim be returned to her within 30 days of the date of this decision.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 28th day of October, 2013

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals

State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: http://dha.state.wi.us

The preceding decision was sent to the following parties on October 28, 2013.

Milwaukee Enrollment Services
Public Assistance Collection Unit